Supreme Court, U. S.
FILED
AUG 9 1975
MICHAEL RODAK, JR., CLERK

No. 75-117

In the Supreme Court of the United States

OCTOBER TERM, 1975

BARNEY ROSS and RICHARD VASQUEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-117

BARNEY ROSS and RICHARD VASQUEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court erred in ordering defense counsel to refrain from asking petitioners whether they knew that the victims of their assaults were federal officers. Petitioner Vasquez also contends that the district court should have excluded testimony regarding a separate act of misconduct he committed.

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of assaulting federal officers, in violation of 18 U.S.C. 111, and sentenced pursuant to the provisions of the Youth Corrections Act, 18 U.S.C. 5010(b) and 5017(c). The court of appeals affirmed without opinion (Pet. App. A; 510 F.2d 383).

1. Following his arrest by local police in June 1972 for narcotics offenses, Paul Sams agreed to serve as an informant (Tr. 896). The evidence at trial, now taken in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), demonstrated that on July 2, 1972, Sams telephoned Officer Nick Fatta, introduced Ross Hart, and stood by while Fatta negotiated with Hart for the purchase of a quantity of marihuana (Tr. 899). On the morning of July 9 a group of local and federal officers arrived at the Diamond Apartments in League City, Texas, expecting Sams to take delivery of marihuana. All of the officers and agents were dressed in civilian clothes. Several of the agents took up positions around the building; Agent Robert Parsons hid in a rear bedroom of apartment 6-C, where the transaction was to take place (Tr. 618-621).

At 3:45 p.m. petitioner Ross arrived (Tr. 208, 217). Another car (the Hart car) arrived, carrying Sams, Ross Hart, and petitioner Vasquez. All four men walked to apartment 6-C (Tr. 223-224). Shortly thereafter Vasquez and Hart left the apartment and

walked to the Hart car. Ross left the apartment and drove his own car to a spot adjacent to the Hart car (Tr. 225-227). Ross removed three shopping bags from the trunk of his car. Petitioners and Hart each carried a bag to apartment 6-C (Tr. 228).

Agent Parsons, still hidden in the bedroom, saw petitioners and Hart enter the apartment and heard one of them say that they were armed (Tr. 670). Sams and petitioner Vasquez left the apartment to obtain the purchase money, which Sams told petitioners he had hidden in the trunk of a car (in fact an unmarked police car) (Tr. 662-663). The officers and agents had arranged with Sams that Sams would not open the trunk until the marihuana had been delivered (Tr. 256-257).

When the trunk was opened, the officers and agents drew their weapons and converged on Sams and Vasquez. As they approached Vasquez, Officers Fatta and Mullican yelled "Police Officers" (Tr. 851, 1064, 1162). Petitioner Vasquez drew a pistol and fired at Agent Alvarez. The officers and agents returned the fire, wounding Vasquez in his right arm. Vasquez fired no additional shots.

Inside the apartment Agent Parsons, hearing the gunshots, decided to arrest Ross and Hart. On emerging from the bedroom Parsons, with gun drawn, identified himself as a police officer. Petitioner Ross fired at Parsons; Parsons returned the fire, striking Ross twice in the knee and grazing his scalp. None of the five rounds fired by Ross struck Parsons (Tr. 677-679, 681, 800).

2. Prior to trial the district court ruled that it was irrelevant whether or not petitioners knew their victims were federal officers; the court stated that "Defendants shall not make statements and their Counsel shall not ask questions or make statements which indicate that Defendants did not know that the persons they assaulted were Federal officers" (Tr. 42). The court explained that this ruling simply preventing counsel from asking petitioners on the stand, "Did you know at the time that he was a Federal officer?" (Tr. 44). Counsel were not prohibited from inquiring whether petitioners had known or seen the victims beforehand; only "the $64 question" containing the term "Federal officer" was barred (Tr. 44). Petitioners argue (Pet. 26-30) that this restriction was improper.

Petitioners rely upon the Court's caveat in *United States* v. *Feola*, 420 U.S. 671, 686, that knowledge of the federal employment of the person assaulted conceivably could be relevant in the exceptional case where an individual assaults a federal officer in the honest but mistaken belief that he was resisting an unlawful use of force. Petitioners' defense involved no such claim. Petitioner Ross contended that he never fired a shot (Tr. 2684), and petitioner Vasquez contended that he discharged his pistol accidentally (Tr. 2454) without ever having aimed it at anyone. Moreover, the district court clarified its order to permit counsel to inquire into petitioners' knowledge (or lack of knowledge) that the persons they assaulted were law enforcement officers (Tr.

37-44). Counsel was at liberty to ask questions designed to establish that petitioners believed they were defending themselves from an assault by private parties. This case therefore is controlled by *Feola's* central holding: knowledge that the assault victim was a federal officer (as opposed to a state officer) is irrelevant.

3. Testifying in his own defense, petitioner Vasquez was shown a photograph taken three months before the shooting incident, following his arrest by Houston police officers for intimidating an off-duty detective (Tr. 2464-2467). Acknowledging that he was the person in the photograph, Vasquez denied that the arrest was the result of misconduct on his part (Tr. 2467-2478). That testimony was in turn impeached by the detective himself, who testified that in April 1972 petitioner Vasquez, after skidding to avoid the detective's car on a freeway, followed the detective's car and, at a traffic light, left his own car and entered the detective's car. When the detective drew his gun and identified himself, Vasquez remarked "A cop—if I had known that, I would have killed you" because, although he had killed Viet Cong while on military duty, his "real desire" was to kill a policeman (Tr. 2773-2806).

Petitioner Vasquez contends that the court should not have allowed the detective to give this testimony. But the testimony was pertinent because it impeached petitioner Vasquez's testimony; it also demonstrated petitioner's intent to assault the federal officers. The

district court did not abuse its discretion by allowing this collateral inquiry.

In any event, any claim regarding the detective's testimony has been waived by defense counsel. After Vasquez had been cross-examined on the incident, the trial was delayed for about a week. When it resumed the court offered to instruct the jury to disregard Vasquez's testimony regarding his own misconduct. Defense counsel objected, indicating his intention to develop the matter further on redirect examination "without waiving any position initially taken that the matter should not have been gone into in the first place" (Tr. 2638). The district court responded: "I don't believe you can have your cake and eat it, too, Mr. Haynes" (*ibid.*). Petitioner Vasquez's counsel pursued the matter in detail (Tr. 2654-2659), and only thereafter did the prosecution call the detective and elicit the testimony to which Vasquez now objects. In these circumstances, petitioners cannot complain that the prosecutor called the detective to rebut Vasquez's account of the incident.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 594057 64